MOTION FILED
MAR 2 2006

(23)

No. 04-473

IN THE
SUPREME COURT OF THE UNITED STATES

GIL GARCETTI, *et al.*,
Petitioners,

v.

RICHARD CEBALLOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ELAINE MITTLEMAN AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

ELAINE MITTLEMAN
2040 Arch Drive
Falls Church, VA 22043
(703) 734-0482

Counsel for Amicus Curiae

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MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF FOR ELAINE MITTLEMAN AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Elaine Mittleman respectfully moves for leave to file out of time the Brief for Elaine Mittleman as *Amicus Curiae* in Support of Neither Party. Doraine F. Meyer, Senior Deputy County Counsel, County of Los Angeles, a counsel for petitioner, advised undersigned counsel that the County Counsel's Office does not consent to this motion. Cindy S. Lee, counsel for petitioner at oral argument, did not return the telephone calls of undersigned counsel. Bonnie I. Robin-Vergeer, counsel for respondent, has indicated that respondent takes no position on this motion.

Amicus curiae, Elaine Mittleman, is an attorney with a solo practice and is a member of the Supreme Court Bar. She has a long-standing interest in protection of First Amendment rights for federal employees. In her first job after graduating from the University of Michigan Law School, Ms. Mittleman was terminated from her position on the Chrysler Loan Guarantee Board staff at the United States Treasury after raising concerns about Chrysler's financial reporting. She was accused of leaking to the press and presenting a risk of damaging news leaks.

Ms. Mittleman attended the oral argument conducted in this case on October 12, 2005, and was troubled by the failure of the Office of the Solicitor General to make distinctions between the caselaw for federal employees as compared to state, county and municipal employees. and failed to provide information about pertinent statutes, such as the Civil Service Reform Act and the Whistleblower Protection Act.

Following oral argument, Ms. Mittleman wrote a letter dated October 17, 2005, to Solicitor General Paul D. Clement, in which she set out her concerns about the arguments presented by the Solicitor General in its brief, including the failure to provide information about pertinent statutes, such as the Civil Service Reform Act and the Whistleblower Protection Act. She received a letter dated November 18, 2005, from James F. Bellot, Acting Executive Officer. The letter stated that the government's brief accurately and appropriately provided the necessary information on the position of the United States concerning the First Amendment issues at stake and their relevance in the federal employment context. The letter further stated that the

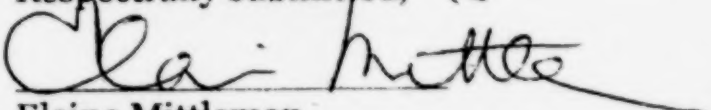
case does not involve the interpretation of the federal statutes Ms. Mittleman discussed in her letter.

Ms. Mittleman has now reviewed the United States Brief in *Whitman v. U.S. Department of Transportation*, No. 04-1131, which presents a question involving the interaction between constitutional claims and the Civil Service Reform Act. She submits that the positions taken by the United States in the *Garcetti* and *Whitman* cases may not be fully consistent. This conflict may only generate further confusion in the jurisprudence of constitutional protection for federal employees.

This Court has ordered reargument in the *Garcetti* case. Accordingly, Ms. Mittleman has prepared the attached *Amicus Curiae* Brief, which describes the confusion in the caselaw, noting the distinctions between federal and municipal employees, and in the positions taken by the United States in the *Garcetti* and *Whitman* cases. She respectfully submits that this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties.

Wherefore, Ms. Mittleman respectfully requests that the Brief for Elaine Mittleman as *Amicus Curiae* in Support of Neither Party be permitted to be filed out of time.

Respectfully submitted,



Elaine Mittleman
2040 Arch Drive
Falls Church, VA 22043
(703) 734-0482

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BRIEF FOR ELAINE MITTLEMAN AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF THE *AMICUS CURIAE* [1]

Amicus curiae, Elaine Mittleman, is an attorney with a solo practice and is a member of the Supreme Court Bar. She has a long-standing interest in the protection of First Amendment rights for federal employees.

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[1] The petitioner has not consented to the filing of this brief. The respondent takes no position on the filing of this brief. No attorney for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, made any monetary contribution to the preparation or submission of this brief.

In 1980, Ms. Mittleman worked at the U.S. Department of the Treasury on the Chrysler Loan Guarantee program after graduating from the University of Michigan Law School. She was interested in the Chrysler Loan Guarantee because of her background in the auto industry, having earned an M.S.I.A. at Carnegie-Mellon and worked at Ford Motor Company on Finance Staff before attending law school.

In her job at Treasury, Ms. Mittleman raised concerns about the Loan Guarantee Board's monitoring of Chrysler's financial condition, which was quite precarious. After she expressed those concerns, including speaking to persons on Capitol Hill, such as Representative David Stockman, she was terminated from her position by Assistant Treasury Secretary Roger C. Altman. Ms. Mittleman's speech about Chrysler's compliance with the requirements under the Loan Guarantee clearly addressed a matter of public concern. *See* Ann Crittenden, *Treasury's Ousted Chrysler Critic*, The New York Times, March 6, 1981, at D1; Andy Pasztor, *Chrysler to Get Additional U.S. Support Though It Hasn't Fully Met Prior Terms*, The Wall Street Journal, February 26, 1981, at 2.

In the context of her firing, Ms. Mittleman was suspected of leaking to the press. A Treasury Inspector General ("I.G.") Report was prepared because Ms. Mittleman took her concerns about monitoring Chrysler to the I.G. Mr. Altman stated in the I.G. Report that there had been several leaks to the press of information regarding Chrysler's financial and operating problems and [based on information Altman received from a congressman], "it was logical to assume that it was she who had passed Chrysler information to the reporter." Altman further stated that he ordered

Ms. Mittleman to be terminated because she "lacked understanding of the real problems plus she presented a potential risk for damaging news leaks."

In December 1980, Chrysler Chairman Lee Iacocca came to the Treasury, seeking additional funds under the Loan Guarantee. On December 8, 1980, the date of the Loan Guarantee Board meeting with Iacocca, Altman ordered that Ms. Mittleman be fired. Shortly thereafter, Altman left the Treasury to return to investment banking in New York. Altman had been interviewing for investment banking positions while employed at the Treasury. As an investment banker, he had Chrysler as a client following his help to Chrysler in receiving government assistance in the Chrysler Loan Guarantee program. *See Altman v. Altman*, 542 N.Y.S.2d 7, 8 (A.D. 1 Dept. 1989)(Altman was negotiating with several investment banking firms when he was preparing to return to Wall Street); David S. Hilzenrath, *A Deputy Secretary's Complex Task*, The Washington Post, February 10, 1993, at C1 (noting Altman's long association with Chrysler, including his work on rescuing Chrysler while he was Assistant Treasury Secretary and then having Chrysler for a client when he returned to investment banking). Altman is now being described as a "legendary deal maker and former Clinton administration official" in line to receive part of the $200 million in fees for his work on "brokering the mega-deal between AT&T and Bell South Corp." *See* Zachery Kouwe, *$200M Phone Charge*, New York Post, March 8, 2006, at http://www.nypost.com/business/64757.htm.

Iacocca famously hated negative publicity and having to report to the government. *See* Lee Iacocca, *Iacocca: An Autobiography* (1984) at 255-57 (although

we fought so hard to keep Chrysler's bad news off the front pages, we soon had to go back to Washington to draw down another $400 million in guarantees; for each drawdown, we had to face up to the bad headlines; the Loan Guarantee Board burdened us with a ridiculous amount of paperwork). Ms. Mittleman believes that Altman gained favor with Iacocca by firing and discrediting her when she criticized Chrysler's financial reporting. Iacocca [who was a Ford executive before he moved to Chrysler] was aware of Ms. Mittleman and her experience at Ford Motor Company. When Ms. Mittleman insisted, in the course of her employment duties, that Chrysler submit the required reports, she was angrily told by a Chrysler executive that she would cause Chrysler to go bankrupt.

Ms. Mittleman sought the assistance of the Office of Special Counsel ("OSC") when she was fired. However, she was a member of the excepted service and was not an employee as defined by the Civil Service Reform Act. As a result, she did not receive any Civil Service protection from being fired. *See* Leslie Phillips, *Whistle-blower measure urges better protection*, USA TODAY, March 15, 1989, at 4A; David Hess, *Informers' bill clears Congress*, Philadelphia Inquirer, March 22, 1989 (in the last eight years, the special counsel has turned down more than 99 percent of whistleblowers' complaints without initiating any corrective action; new bill is too late for Mittleman, whose case is cited by the Government Accountability Project's Thomas Devine as a "classic example of the utter failure of the 1978 Whistleblower's Protection Act.")

One provision in the Whistleblower Protection Act of 1989 was based on Ms. Mittleman's unsuccessful experience with the Office of Special Counsel. *See* S.

Rep. No. 100-413, at 10-11 (1988)("Ms. Mittleman not only did not receive any assistance from OSC on her complaint of reprisal, she was actually hurt by her contacting the OSC because of the OSC investigator's negative comments to OPM").

Based on her experience, Ms. Mittleman is extremely concerned that federal workers who engage in speech on a matter of public concern continue to lack adequate protection. It is necessary that the caselaw be consistent and clearly reflect the fundamental premise of the First Amendment right to speech. The welfare of all is served if federal employees can speak on important matters about the conduct of the government without fearing or suffering retaliation and severe career retribution.

SUMMARY OF ARGUMENT

This case and the pending case of *Whitman v. Department of Transportation*, No. 04-1131, present complex and related questions concerning the constitutional claims of public employees. In addressing these questions, it is necessary to have a complete understanding of the existing statutes and caselaw for federal employees, which is significantly different than the jurisprudence for state, county and municipal employees. For example, the *Pickering/ Connick* balancing test is typically not used in addressing a claim by a federal employee that she suffered retaliation for speech on a matter of public concern.

Further, it is necessary to address the interaction between constitutional claims and statutory provisions, such as the Civil Service Reform Act and the

Whistleblower Protection Act. The United States Brief in this case fails to address these issues. In addition, the arguments presented by the United States in this case and in *Whitman* appear to be contradictory and rely upon different precedents.

It is necessary that the First Amendment rights of federal employees be protected. The statutory provisions of the Civil Service Reform Act and the Whistleblower Protection Act should not preclude a federal employee from obtaining judicial review of a constitutional claim that she suffered retaliation for her speech on a matter of public concern.

ARGUMENT

I. The arguments presented concerning existing First Amendment jurisprudence for public employees must distinguish between federal employees and state, county and municipal employees.

The arguments presented in this case refer to public employees, but fail to distinguish the existing First Amendment jurisprudence for federal employees, as compared with the jurisprudence for state, county and municipal employees (hereinafter, "municipal employees"). The well-known balancing test, as set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 1983), is applied to municipal employees, such as respondent Ceballos, but not to individual federal employees in personnel matters (with perhaps some exceptions).

Moreover, the cause of action alleging a First Amendment claim is different for municipal employees

and federal employees. The respondent, although alleging a constitutional violation, has sued under a statute, 42 U.S.C. § 1983.

By contrast, a federal employee raising a constitutional claim against a superior in federal court does not have a statutory cause of action. Instead, the claim must be based on the judge-made cause of action based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). It is not clear when, if ever, the *Pickering/Connick* balancing test would be used in a *Bivens* action brought by a federal employee. Moreover, as will be discussed below, First Amendment claims by federal employees concerning protected speech have been precluded by the statutory framework of the Civil Service Reform Act and the Whistleblower Protection Act. These statutes have no provision that applies a *Pickering/Connick* balancing test.

If the *Pickering/Connick* balancing test is not used in a First Amendment claim brought by federal employees (but is used in a comparable claim by municipal employees), then the Question Presented in this case does not apply to federal employees. Further, the questions whether speech by a federal employee touches a matter of public concern and whether speech is expressed pursuant to the duties of employment would not be at issue, even though those questions are presented in the claims of respondent Ceballos.

Any ruling in this case, with its supporting rationale, which is construed as applying to "public employees" and which fails to distinguish between federal and municipal employees, will generate further confusion in First Amendment jurisprudence.

II. The Brief for the United States fails to address the interaction between the Civil Service Reform Act, the Whistleblower Protection Act and the First Amendment in claims that a federal employee has suffered retaliation because of her speech.

The confusion as to the applicability of the *Pickering/Connick* balancing test for federal employees has been greatly exacerbated by the glaring omissions in the Brief for the United States. Specifically, the U.S. Brief does not cite or discuss the Civil Service Reform Act ("CSRA") of 1978, Pub.L.No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*), and the Whistleblower Protection Act ("WPA") of 1989, Pub.L.No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 U.S.C.). Similarly, the U.S. Brief does not cite the preeminent caselaw for federal employees, including *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *Bush v. Lucas*, 462 U.S. 367 (1983).

The stark difference in the caselaw analysis and tone between claims under the First Amendment and claims under the Whistleblower Protection Act must be appreciated. Opinions issued about the WPA engage in a highly technical statutory analysis. *See, e.g., Carson v. Department of Energy*, 398 F.3d 1369 (Fed.Cir. 2005). The fundamental rights set out in the First Amendment and as applied in the *Pickering/Connick* test by evaluating whether speech is about a matter of public concern are wholly ignored in WPA caselaw.

Moreover, the obvious tension between the technical provisions of the WPA and the fundamental

speech rights of the First Amendment have continued to fester. In spite of years of effort, Congress has not enacted whistleblower legislation that adequately protects federal employees. *See* Stephen Barr, *Bills Would Expand Whistle-Blower Protections*, The Washington Post, March 17, 2006, at D4 (bills follow a bipartisan effort to clarify whistleblower protection; a key proposal would allow government workers to seek jury trials, one of the rights provided to corporate whistleblowers in the 2002 Sarbanes-Oxley law).

III. The Brief for the United States fails to present or reconcile the arguments presented in this case and in the pending case of *Whitman v. Department of Transportation*, No. 04-1131.

The case of *Whitman v. Department of Transportation*, No. 04-1131, is pending before this Court. That case concerns the interaction between the Civil Service Reform Act and a constitutional claim, although apparently not a claim based on constitutionally-protected speech. The United States, in its Brief for the Respondents in *Whitman*, addresses at length the CSRA and describes the confusing and uncertain interplay between claims brought pursuant to the CSRA and the Constitution.

In its *Whitman* Brief at 32, the United States argues that petitioner's constitutional claims must be raised through the procedures prescribed by the CSRA. There is no mention of any *Pickering/Connick* balancing test. By contrast, in its *Garcetti* Brief, the United States does not even mention the CSRA. Further, the United States does not argue in the *Garcetti* Brief that a federal employee's constitutional

speech claims must be raised through the procedures prescribed by the CSRA.

The arguments presented by the United States in the *Garcetti* and *Whitman* cases cannot be reconciled. This conflict may have been generated by the fact that the *Garcetti* case concerns an employee of Los Angeles County. However, the Question Presented utilized the broad term, "public employee." The United States may have tried to construct its argument to support the position of Los Angeles County, while ignoring the pertinent federal caselaw and statutes. It would have been far preferable for the United States, as *Amicus Curiae* in *Garcetti*, to set out fully the caselaw for federal employees and then compare it to caselaw for municipal employees. The intermingling of and substitution between caselaw for federal and municipal employees is significantly misleading.

IV. The argument by the United States based on *Huffman v. OPM* is misleading, because *Huffman* concerns the Whistleblower Protection Act and not the First Amendment.

The United States further confuses the jurisprudence by its reliance upon *Huffman v. OPM*, 263 F.3d 1341 (Fed.Cir. 2001), in its Brief at 27. The question in *Huffman* was whether an employee's complaints constituted "disclosures" under the Whistleblower Protection Act. Thus, the *Huffman* analysis was based on the legislative history of the WPA. The reasoning in *Huffman* is not applicable to the Question Presented in this case, which is whether speech that is part of the duties of employment is

protected under the First Amendment and the *Pickering/Connick* test.

The reliance of the United States on *Huffman* is misleading also because of the unique job responsibility (working in an Inspector General's office) at issue. It is incorrect to generalize from the limited factual situation presented in *Huffman*. A Texas state court refused to follow *Huffman*, noting that "*Huffman* is contrary to our own precedent and other Texas cases, which hold that a public employee who reports a violation of law in the course of his employment is protected by the Act." *See Rogers v. City of Fort Worth*, 89 S.W.3d 265, 276 (Tex.App.-Fort Worth 2002).

The United States, in its Brief at 27, makes the exceedingly vague representation that Congress and state legislatures have enacted whistleblower laws and some of them do provide protection, at least in certain circumstances, for employees whose job duties obligate them to report official wrongdoing. As discussed above, the United States wholly failed to describe pertinent caselaw or even cite the Whistleblower Protection Act. Thus, this statement filled with qualifiers is meaningless. The reliance upon *Huffman* in this context simply confuses yet again.

V. In the *Whitman* case, the United States has now acknowledged that the CSRA and WPA cannot preclude judicial review of First Amendment claims of federal employees.

The United States has made a very significant admission in the *Whitman* case. In the U.S. Brief at 47 in *Whitman*, the United States has acknowledged that

the structure of the CSRA is not a sufficient basis to overcome the presumption in favor of judicial review of constitutional claims.

The courts had previously held that the CSRA precludes constitutional claims, but, in so holding, the courts often failed to apply the technical statutory analysis required. The U.S. Brief in *Whitman* makes clear that the CSRA requires evaluation of personnel actions, prohibited personnel practices, and major as compared to minor adverse actions. In addition, persons, such as Ms. Mittleman, who were in the excepted service [as a Schedule A employee] and not the competitive service, were not provided with complete statutory protection under the CSRA.

The courts were fully aware that persons, such as Ms. Mittleman, did not receive protection under the CSRA and yet those persons were precluded from seeking judicial review of a First Amendment claim. *See Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988); *Hall v. Clinton*, 235 F.3d 202, 205 (4th Cir. 2000); *Hall v. Clinton*, 285 F.3d 74, 81 (D.C.Cir. 2002)(CSRA is the exclusive remedy for federal employees with individualized job grievances, even it if affords incomplete relief).

Ms. Mittleman pursued lengthy and extremely burdensome litigation to seek a remedy from her experience at the Treasury. The many issues presented in that litigation will not be discussed here, but it is important (at least to Ms. Mittleman) to note that she did not receive proper judicial review or any remedy whatever for her First Amendment claim that she was fired because she criticized Chrysler and was suspected of leaking to the press. *See Mittleman v. United States*

Treasury, 773 F.Supp. 442, 449, 453 (D.D.C. 1991) (CSRA is the exclusive remedy; the fact that Congress explicitly denied a remedy to Schedule A employees shows an intention to deny them a statutory or constitutional remedy for damages).

Ms. Mittleman submits that those holdings [that the CSRA precluded constitutional claims] were premised upon an extremely broad and incorrect interpretation of congressional intent. Without engaging in a detailed analysis here, Ms. Mittleman submits that Congress did not [and could not constitutionally] explicitly deny a remedy to Schedule A employees, such as Ms. Mittleman. Rather, Ms. Mittleman was simply outside the coverage of [and essentially ignored] by the CSRA. The United States has now conceded that this broad interpretation of congressional intent was not correct. In its *Whitman* Brief at 48, the United States acknowledges that the CSRA does not contain the requisite clarity to foreclose judicial review of the limited class of constitutional claims that are not resolved through the administrative process.

Ms. Mittleman respectfully submits that cases, such as hers, present significant First Amendment claims that were plainly not resolved through the administrative process. Federal employees, such as Ms. Mittleman, should be able to obtain judicial review of their constitutional claims. There are important issues concerning government accountability at stake which clearly merit judicial review.

Moreover, if federal employees can now bring constitutional claims to court (after availing themselves of any administrative process), then the well-known

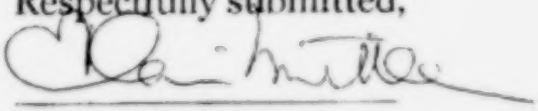
Pickering/Connick balancing test presumably should apply. In other words, the First Amendment jurisprudence (including the balancing test) should be applicable to all employees. There should not be (as there is now) a distinction in status under the First Amendment for federal employees as compared to municipal employees.

It is necessary that the Court address the availability of constitutional claims by federal employees in light of existing jurisprudence and hold that federal employees do, in fact, have a right to judicial review of their constitutional claims under the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,



Elaine Mittleman
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